

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.02.2005

CORAM

THE HONOURABLE MR JUSTICE N.DHINAKAR

and

THE HONOURABLE MR JUSTICE A.KULASEKARAN

Criminal Appeal No. 769 of 1996

S.H.O.,
Odiyansalai, Rep. by
Public Prosecutor for Pondicherry,
in High Court, Madras. ... Appellant / Complainant

Vs

1. Subramani @ Jeeva @ Kullajeeva
2. Ranjit Kumar @ Ali @ Periya Ali
3. Ajanthakumar @ Ali
4. Velu
5. Murugapandi
6. Selvam
7. Mohamed Rafi ... Respondents / Accused

Prayer: Appeal against the judgment passed by the learned II
Additional Sessions Judge, Pondicherry, in S.C.No.56 of 1993 dated
26.08.1994.

For Appellant : Mr.A.Suryaprakasam
Addl. Public Prosecutor,
Pondicherry.

For Respondents : Mr.K.Ashok Kumar, S.C.
for M/s.N.Mohideen Basha

* * * * *

J U D G M E N T

(Judgment of the Court was delivered by N.DHINAKAR,. J)

The State is the appellant. Respondents 1 to 7 were arrayed as A-1 to A-7 before the learned II Additional Sessions Judge, Pondicherry, in Sessions Case No.56 of 1993. The learned trial Judge, framed charges against the first respondent under Sections 148, 302 and 324 read with 149 I.P.C. and against respondents 2 to 7, under Sections 147, 302 read with 149 and 324 read with 149 I.P.C. After the trial, on the recorded evidence, he found all the respondents not guilty and acquitted them. Hence, the present appeal by the State, by which the acquittal is challenged.

2. The case of the prosecution is this:

P.W.1 is the brother of the deceased Tamilvendhan and he was living along with his family at Vaithikuppam village. P.W.1 was working as textile designer in A.F.T. Mill at Pondicherry. After returning from duty on 4.11.91, he went to a movie accompanied by Tamilvendhan, the deceased in the case and thereafter, went to a restaurant in Labortene street at Pondicherry. At the restaurant, his friends, P.Ws.2, 4 and another joined him. They ordered their meals and while they were waiting for the food to be served, they heard noises of breaking plates and saucers inside the room. Respondents 1 to 7 came out of the room and while passing P.Ws.1, 2, 4 and Tamilvendhan, the first respondent commented in a derisive manner that the witnesses and the deceased are still taking food. Tamilvendhan laughed at them and the first respondent called his friends, who are respondents 2 to 7 and they surrounded the table. The first respondent took a beer bottle, which was on the table, broke it by hitting it to the bottom of the table and stabbed Tamilvendhan on his left neck below the ear. When P.W.1 intervened, he also suffered injuries. On seeing this, P.W.2 came to the rescue and he was also attacked by the first respondent. Tamilvendhan fell down with bleeding injuries and thereafter, respondents 1 to 7 went away from the place. This was at 10.45 p.m. As there was no response from his brother, P.W.1 went and brought a rickshaw and he and P.W.2 took Tamilvendhan to the Government Hospital, Pondicherry, where he was produced before P.W.10, the Casualty Medical Officer at 11.10 p.m. The doctor, on examining Tamilvendhan, found him dead. The body was sent to mortuary and an intimation was also sent to the police station. Ex.P.11 is a copy of the accident register. The doctor examined P.W.2 and found two lacerated injuries, one measuring 0.5 x 1 x 0.5 cms. and another measuring 0.5 x 0.5 x 0.5 cms. over the right eye brow and also noted two similar injuries present below the left eye and below the left angle of mouth. The wound certificate in respect

of P.W.2 is Ex.P.12. P.W.1 was examined and on his person, the doctor noticed tear of right ear lobule measuring 0.5 cm. and an abrasion on the left side of the umbilicus measuring 0.5 cm. x 1 cm. Ex.P.13 is the wound certificate issued by him.

3. On receipt of the intimation at 11.20 p.m., P.W.20, the Sub-Inspector of Police attached to Odiansalai police station, reached the hospital and questioned P.W.1. P.W.1 gave a statement, which is Ex.P.1 in this case. P.W.20 returned to the police station and a crime was registered. The printed first information report is Ex.P.27 and the express reports were despatched to the higher officials. P.W.21, the Inspector of Police attached to Grand Bazaar Circle, on receiving the information from P.W.20, proceeded to Odiansalai police station and reached it at 1.10 a.m. on 5.11.91. He informed his senior police officers over phone, who asked him to conduct investigation. The police photographer, P.W.17, was asked by P.W.21 to go over to the scene of occurrence. P.W.21 left for the scene of occurrence along with his party including P.W.20 and reached it at 1.45 a.m. By the time he reached the scene of occurrence, he found that blood-stains and other materials have been removed and completely washed by water. He prepared an observation mahazar, Ex.P.5, at 2.00 a.m. attested by P.W.5 and one Vetrivel. He prepared a rough sketch, Ex.P.28. P.W.17, the photographer reached the scene of occurrence and took photographs on the directions of P.W.21. At 2.45 a.m., P.W.21 seized M.Os.5, 6 and 7 series under a mahazar, Ex.P.6, attested by P.W.5 and another and at 3.10 a.m., he seized M.O.8 series under a cover of mahazar, Ex.P.7, attested by the same witnesses. He examined P.Ws.3, 5 and four other witnesses, whose statements were recorded. P.W.21 left the scene of occurrence and proceeded to Government Hospital, Pondicherry, where he examined P.Ws.1, 2 and 10 and their statements were recorded. He left the Government Hospital and on reaching the police station, summoned witnesses, Arockiadoss and P.W.14 and their statements were recorded. He sent special parties to collect information about the accused and at 7.15 a.m., on his instructions, a police constable seized M.Os.1 and 2 from P.W.1 and M.Os.3 and 4 from P.W.2 under Exs.P.2 and P.3 respectively. The panchayatdars were summoned to the hospital and inquest was conducted between 8.00 a.m. and 10.30 a.m., during which, P.Ws.1, 3 and others were examined. Ex.P.9 is the inquest report. After the inquest, the body was handed over to a police constable with a requisition to the doctor for conducting autopsy.

4. On receipt of the requisition, P.W.11, Tutor in Forensic Medicine, Government General Hospital, Pondicherry, conducted autopsy on the body of Tamilvendhan and found the following three injuries, which are noted in Column No.8 of the post-mortem certificate, Ex.P.16:-

1. An irregular incised wound on left side of neck, just above left clavicle, measuring 6 x 5 x 5 cm. and exposing muscles. On dissection, neck vessels found cut.
2. An obliquely placed incised wound in upper part of left side of neck, measuring 15 x 3 x 4 cm., exposing deeper muscles. It extends below the left ear to a point in front of tragus.
3. An abrasion 2 x 1/2 cm. over the lower part of left cheek.

In the post-mortem certificate, Ex.P.16, the doctor has given his opinion opining that death was on account of shock and haemorrhage due to the injury to neck.

5. After the post-mortem, the dead body was handed over to the relatives and P.W.21, continuing with his investigation, at 1.30 p.m., examined P.W.1 for a second time. He proceeded to Lawspet to contact his informant and went in search of the 7th respondent to his house, where he was not available. He went in search of the first respondent, who is the close associate of the 7th respondent; but he was also found absconding. On 7.11.91, he examined P.Ws.9, 12 and others and their statements were recorded. He searched for the accused on 8.11.91 and also formed special groups to trace and arrest the accused. On 9.11.91, he examined P.W.6 and on 12.11.91, he examined P.W.13. The blood-stained banian, torn pieces (4 numbers), M.O.24 series and the blood-stained ash colour shirt, torn pieces (2 numbers), M.O.25 series, which were kept in a polythene bag, were seized under a cover of mahazar, Ex.P.21, in the presence of P.Ws.14 and 15. The statement of P.Ws.14 and 15 were recorded. He gave a requisition to the Chief Judicial Magistrate to record the statement of P.Ws.9, 12 and 13 on 13.11.91. The material objects were sent to Court. He arrested respondents 6 and 7 near Gorimedu on 15.11.91 and brought them to the police station. Later, they were sent to Court for remand. He gave a requisition, Ex.P.25, to the Chief Judicial Magistrate to conduct a Test Identification Parade for respondents 6 and 7. The Sub Divisional Judicial Magistrate recorded the statement of P.Ws.9, 12, 13 and one Stalin on 15.11.91. On 26.11.91, the 5th respondent surrendered before Odiansalai police station at 1.30 a.m. and at 2.00 a.m., the 4th respondent surrendered at the police station. Respondents 1 and 2 were arrested at 4.30 a.m., when they were near Raju Industries at Mettupalayam, who were brought to the police station. The 3rd respondent was arrested at his residence at 5.15 a.m. The second respondent gave a statement and in pursuance of the statement, he took the police party to Gandhi Nagar, where he produced M.O.11, which was seized under a mahazar, Ex.P.23, attested by P.W.16. P.W.10, thereafter, was questioned and his statement was recorded. The officer sent A-1 to A-5 to the Court of Chief Judicial Magistrate for remand and also gave a requisition on the same day

to conduct Test Identification Parade in respect of A-1 to A-5.

6. On receipt of the requisition, P.W.18, the Sub Divisional Judicial Magistrate, Pondicherry, conducted Test Identification Parade in respect of respondents 6 and 7 on 23.11.91. P.Ws.1 and 2 identified them. The proceedings of the learned Magistrate as regards the Test Identification Parade conducted by him are contained in Ex.P.24. Similarly, on receipt of the requisition from the investigation officer, P.W.19, the Sub Divisional Judicial Magistrate, Pondicherry, conducted Test Identification Parade on 29.11.91 in respect of respondents 1 to 5 on the directions of the Chief Judicial Magistrate, Pondicherry. P.Ws.1 to 4 and two others were summoned to the Central Jail, Pondicherry, where the witnesses identified all the respondents. The proceedings as regards the parade conducted by the learned Magistrate are contained in Ex.P.26.

7. In the meantime, P.W.21 examined P.W.11, the doctor and after obtaining the final opinion, Ex.P.18, filed the final report against the respondents before the Court.

8. The respondents were questioned on the incriminating circumstances appearing against them by the learned trial Judge under Section 313 Cr.P.C. They denied all the incriminating circumstances. They did not examine any witness on their side.

9. The learned Additional Public Prosecutor, The Government of Union Territory of Pondicherry, submits that P.W.1 having given the identifying features of the first respondent and having identified him in the Test Identification Parade conducted by P.W.19, as could be seen from his proceedings, Ex.P.26 and also in view of the fact that he was able to identify him on the date when he was examined in Court, the learned trial Judge was not justified in acquitting the first respondent, though he fairly submits that he is not pressing the case in respect of other respondents, since, according to him, there is no material to show that respondents 2 to 7 knew that the first respondent is going to stab the deceased Tamilvendhan and hence, they cannot be mulct with the liability with the aid of Section 149 I.P.C.

10. The learned senior counsel appearing for the respondents submits that though the first respondent was identified by P.Ws.1 and 2 in the Test Identification Parade conducted by P.W.19, in Court, they were not specifically asked to identify the first respondent as the person, who is having the same features, which were mentioned by P.W.1 in the complaint, Ex.P.1 and therefore, the learned trial Judge was justified in acquitting the first respondent. It is his further submission that this appeal being one against acquittal and if two views are possible, the view in favour of the accused/respondents is to be

accepted, unless the Court finds that the reasons given by the learned trial Judge are perverse and the appeal cannot be allowed on the ground that the other view in favour of the accused/respondents could have been taken by the learned trial Judge.

11. We have considered the rival contentions and perused the evidence, which shows that the prosecution has successfully established the cause of death of Tamilvendhan by examining P.W.11, the doctor, who conducted autopsy and who issued Ex.P.16, the post-mortem certificate, since, in his evidence, P.W.11 has stated that all the injuries, which he found on Tamilvendhan, are ante-mortem in nature and that they could have been caused by using a big piece of broken neck portion of a bottle like M.O.5.

12. The question that is to be decided by us is whether the learned trial Judge was justified in acquitting the first respondent. The case against the first respondent is discussed by the learned trial Judge for acquitting him in paragraph 23 of his judgment. In the judgment, the learned trial Judge has stated that P.W.21, the Inspector of Police, did not specifically say in his evidence as to where the occurrence had taken place, since he did not say whether the occurrence had taken place in front hall or inside the restaurant near the dining table or outside the entrance of the restaurant near the steps. He has also stated that the officer did not take any steps to scrap the blood-stains for sending it to the analysis and that he did not direct P.W.17, the photographer, to take photographs of the restaurant. He went on to hold that the owner of Siva Tea Stall, from where M.O.11, a blood-stained brown colour shirt, was seized, though was cited as a witness, was not examined. He also found fault with the prosecution for not letting in any evidence to show as to whom M.O.11, the blood-stained brown colour shirt, belongs and as to where M.O.24 series, torn pieces of banian (4 numbers) and M.O.25 series, torn pieces of ash colour shirt (2 numbers) were present at the time of occurrence and to whom they belong. The learned trial Judge, while discussing the identification parade conducted by P.W.19, held that P.W.19, in his evidence stated that respondents 1 to 5 have complained to him when he conducted the test identification parade that their photographs were taken by the police before they were sent to Court for remand and the said complaint of respondents 1 to 5 is found noted in Ex.P.26 and therefore, the test identification parade has no value and cannot be taken into consideration. He further held that though Tamilvendhan died, there is no evidence to incriminate any of the accused persons directly with his death and accordingly, acquitted the first respondent as well as the other respondents.

13. To say the least, the above reasons given by the learned trial Judge cannot be accepted, as, on the face of it,

they are not only perverse, but the learned trial Judge has also misdirected himself on the question of law relating to Section 9 of the Evidence Act, which deals with the test identification parade. P.Ws.1 and 2 have, admittedly, suffered injuries during the course of the same transaction, during which Tamilvendhan was stabbed. The evidence discloses that immediately thereafter, Tamilvendhan was removed to the hospital and produced before the doctor, P.W.10, who pronounced him dead and an intimation was also sent to the police authorities. On receipt of the intimation, P.W.20 went to Government Hospital, Pondicherry and recorded the statement of P.W.1. In the said statement, which stands marked as Ex.P.1, P.W.1 has stated that his younger brother, Tamilvendhan, was attacked with a broken beer bottle by a short person with bald head, after he and his friends picked up a quarrel with them. Therefore, it is clear that even at the earliest point of time, P.W.1 had given the special and specific identifying features of the first respondent, namely that he was short and bald. It is not the case of the first respondent when he was questioned under Section 313 Cr.P.C. nor is it the finding of the learned trial Judge, who had an opportunity of seeing the first respondent in Court, that the first respondent was not short and not bald. In this background, it is to be remembered that the occurrence had taken place on 4.11.91 and the respondents were arrested on 26.11.91 and immediately within three days thereafter, that is, on 29.11.91, the test identification parade was conducted by P.W.19. This shows the speed with which the investigating agency acted in taking efforts to conduct the test identification parade of the accused concerned and in fact, as we stated earlier, the test identification parade was conducted on the third day of the arrest of the first respondent. Therefore, the finding of the learned trial judge that the first respondent and the other accused complained to him that their photographs were taken by the police and hence, the test identification parade has no value and cannot be taken into consideration cannot be accepted by this Court.

14. The learned trial Judge failed to note the law laid down by the Supreme Court, in DANA YADAV v. STATE OF BIHAR [(2002) 7 SCC 295]. The Supreme Court has held that it is well settled that failure to hold test identification parade, which should be held with reasonable dispatch, does not make the evidence of identification in court inadmissible, rather the same is very much admissible in law. The Supreme Court, posing a question as to the probative value of the test identification parade, answered by stating that identification of an accused for the first time in court by a witness should not be relied upon, the same being from its very nature, inherently of a weak character, unless it is corroborated by his previous identification in the test identification parade or any other evidence. The purpose of test identification parade is to test the observation, grasp, memory, capacity to recapitulate what a

witness has seen earlier, strength or trustworthiness of the evidence of identification of an accused and to ascertain if it can be used as reliable corroborative evidence of the witness identifying the accused at his trial in court. The Supreme Court further held that if a witness identifies the accused in court for the first time, the probative value of such uncorroborated evidence becomes minimal so much so that it becomes, as a rule of prudence and not law, unsafe to rely on such a piece of evidence and further, after referring to an earlier judgment of the Supreme Court in *STATE OF MAHARASHTRA v. SUKHDEV SINGH* [(1992) 3 SCC 700], held that if a witness had any particular reason to remember about the identity of an accused, in that event, the case can be brought under the exception and upon solitary evidence of identification of an accused in court for the first time, conviction can be based. The Supreme Court also referred to the case of *RONNY* [(1998) 3 SCC 625], wherein it has laid down that where the witness had a chance to interact with the accused or that in a case where the witness had an opportunity to notice the distinctive features of the accused which lends assurance to his testimony in court, the evidence of identification in court for the first time by such a witness cannot be thrown away merely because no test identification parade was held.

15. In the above judgment, the Supreme Court, quoted with approval, the following passages from its earlier judgment in *RAMANBHAI NARANBHAI PATEL* [(2000) 1 SCC 358]:-

"It, therefore, cannot be held, as tried to be submitted by learned counsel for the appellants, that in the absence of a test identification parade, the evidence of an eyewitness identifying the accused would become inadmissible or totally useless; whether the evidence deserves any credence or not would always depend on the facts and circumstances of each case."

"the fact remains that these eyewitnesses were seriously injured and they could have easily seen the faces of the persons assaulting them and their appearance and identity would well remain imprinted in their minds especially when they were assaulted in broad daylight."

and ultimately held that conviction of the accused was upheld on the basis of solitary evidence of identification by a witness for the first time in court.

16. In *GOPAL & OTHERS. v. STATE OF U.P.* (J.T. 2001 (4) SC 439), the Supreme Court, while considering Section 9 of the Evidence Act as regards the test identification parade, held that

the test identification parade would have been necessary for the investigating officer, if the eyewitnesses questioned by him had not given any indication of identity of the assailants and further held that since in the case before it, P.W.1 had given details of the assailants in the F.I.R. itself, no investigating officer would normally resort to a test identification parade.

17. The above two judgments of the Supreme Court, therefore, make it clear that if the identifying features of the assailant are given in the first information report and even if there is no test identification parade, still the assailant can be convicted on the basis of the identification of the assailant by a witness in Court. When such is the position of law, we are at a loss to understand as to how the learned trial Judge, in this case, where not only P.W.1 had given identifying features of the first respondent in the complaint, Ex.P.1, but has also identified him in the test identification parade as well as in court when he gave evidence, thought it fit to reject the evidence of P.W.1 on the ground that the suspects/accused stated that the witnesses have seen them in Odiansalai police station before they were sent to Court and their photographs were taken by the police at the police station.

18. Similarly, the finding of the learned trial Judge that P.W.21 did not give any details as to the exact place of occurrence, whether it had taken place in front hall or inside the restaurant near the dining table or outside the entrance of the restaurant near the steps cannot be a ground to reject the prosecution version. Similarly, the non-examination of the owner of a tea stall, from where M.O.11 was seized and the lack of evidence regarding the place, from where M.O.24 series, torn pieces of banian (4 numbers) and M.O.25 series, torn pieces of an ash colour shirt (2 numbers) were seized and to whom M.O.11, M.O.24 series and M.O.25 series belong are not fatal to the prosecution and the learned trial Judge was not justified in rejecting the prosecution on these grounds.

19. As we stated earlier, P.Ws.1 and 2 have suffered injuries during the course of the same transaction, during which Tamilvendhan was stabbed and that P.W.1 has given the complaint to the police station giving the details of the identifying features of the first respondent and that both the witnesses have also identified the first respondent in the test identification parade, which was conducted within three days of their arrest and in the above background, the learned trial Judge ought to have convicted the first respondent. We, therefore, set aside the acquittal of the first respondent.

20. The final question that is to be decided by us is the nature of offence committed by the first respondent. The

facts, which we have extracted and discussed above, indicate that the first respondent and his friends as well as P.Ws.1, 2, 4 and the deceased Tamilvendhan were strangers to each other. They accidentally met at the restaurant when the first respondent and his friends came out of the room and saw P.Ws.1, 2, 4 and the deceased in front of a table. The first respondent, looking at P.Ws.1, 2, 4 and the deceased, made fun of them by telling his friends that they are still eating. The deceased got annoyed and questioned him as to why he is making such caustic remarks and thereafter, even according to P.W.1, a quarrel ensued between the two groups and suddenly, during the quarrel, the first respondent, who was admittedly not armed with any weapon, took a beer bottle, which was on the table, broke it and stabbed the deceased on his left neck near the ear, which unfortunately proved fatal. We are, therefore, of the view that though the acquittal of the first respondent is to be set aside and he is to be convicted, he can only be convicted under Section 304 Part-II I.P.C., since the occurrence, admittedly, took place in a quarrel and the first respondent stabbed the deceased without any premeditation, in the heat of passion and he did not take any undue advantage nor did he act in an unusual or cruel manner. We, accordingly, set aside the acquittal of the first respondent and convict him under Section 304 Part-II I.P.C., for which he is sentenced to rigorous imprisonment for a period of three years. This Court makes it clear that the sentence of imprisonment of three years imposed upon the first respondent is after taking into consideration the long lapse of 15 years between the date of occurrence and the date of judgment of this Court and also on the submission of the learned senior counsel for the first respondent that the first respondent has a mentally retarded sister and a widowed sister at home, who are to be taken care of.

21. In the result, the acquittal of the first respondent is set aside and he is convicted under Section 304 Part-II I.P.C., for which he is sentenced to rigorous imprisonment for a period of three years. The appeal is allowed in respect of the first respondent, who is the first accused, and the same is dismissed in respect of the other respondents. The learned Sessions Judge shall take steps to take the first respondent into custody and then, send him to jail to serve the remaining period of sentence.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

sra

To

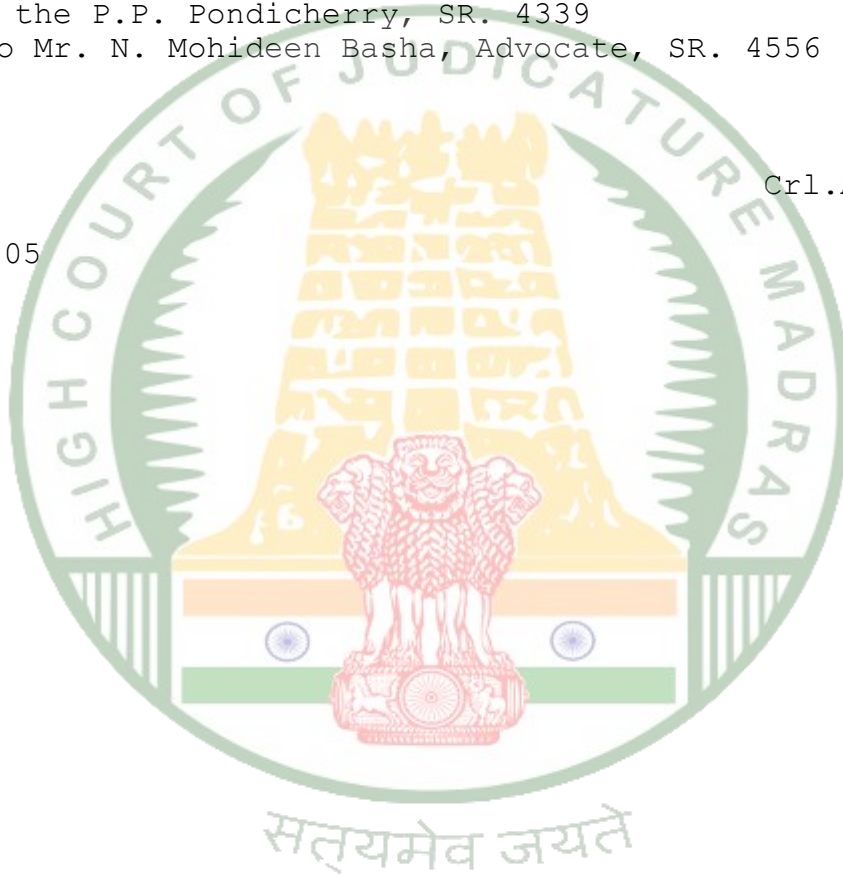
- 1.The II Additional Sessions Judge, Pondicherry.
- 2.-do-Thro' The Principal Sessions Judge, Pondicherry
- 3.The District Collector, Pondicherry.
- 4.The Inspector General of Police, Pondicherry.
- 5.The Superintendent, Central Prison, Pondicherry
- 6.The Inspector of Police, Odiansalai Police Station, Pondicherry.
- 7.The Public Prosecutor, Pondicherry. High Court, Madras

1 cc to the P.P. Pondicherry, SR. 4339

2 ccs to Mr. N. Mohideen Basha, Advocate, SR. 4556

NG (CO)
kk 9.2.05

Cr1.A.No.769 of 1996



WEB COPY